

OCTOBER TERM, 1919

No. 243

THE UNITED STATES, APPELLANT,

vs.
THE OMAHA TRIBE OF INDIANS.

No. 244

THE OMAHA TRIBE OF INDIANS, APPELLANT,

vs.
THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1918.

No. 737.

THE UNITED STATES, APPELLANT,

vs.

THE OMAHA TRIBE OF INDIANS.

No. 738.

THE OMAHA TRIBE OF INDIANS, APPELLANT,

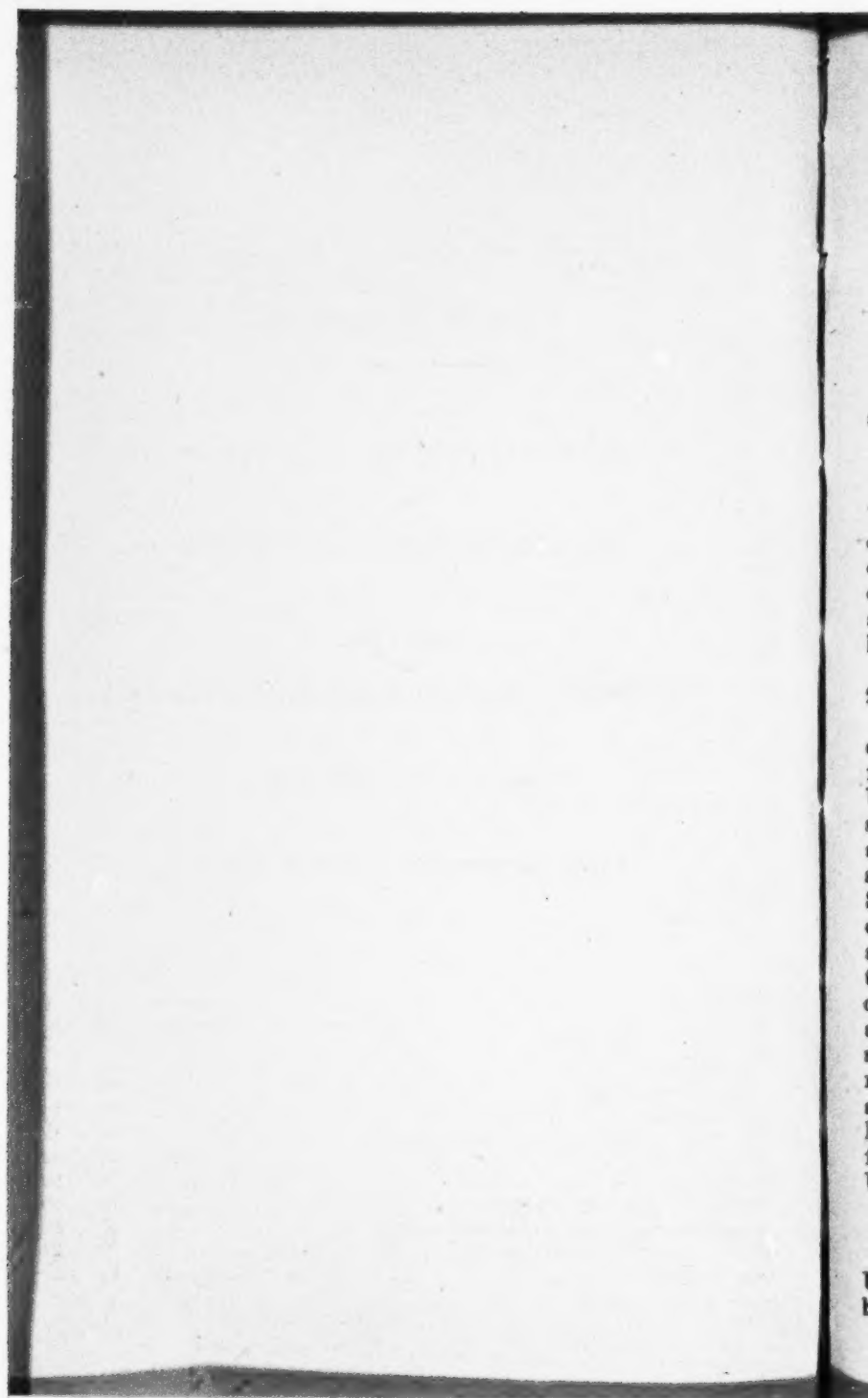
vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

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the United States, and proclaimed June 21, 1854, by the President of the United States (10 Stats., 1043; 2 Kappler's Indian Laws and Treaties, 611), the Omaha Tribe of Indians ceded a large
3 part of the lands recognized by the United States of America to belong to said tribe of Indians to the United States, but with a provision whereby in the event the Omaha Tribe of Indians should elect not to have reserved to them and to occupy as their future home the lands of the Omaha Tribe west of the Missouri River and north of a line drawn due west from a point in the center of the main channel of said Missouri River due east of where the Ayoway River disembogues out of the bluffs to the western boundary of the Omaha country, the lands of the Omahas west of the Missouri River and south of said division line being ceded to the United States, that said Omaha Tribe of Indians should have a right to have reserved to it and to occupy as its future home a certain tract of land of not to exceed three hundred thousand acres, situated south of the north boundary line of the tract of country it, the Omaha Tribe of Indians, ceded to the United States, and that said Omaha Tribe of Indians, if they elected after examination of the same, not to accept and not to have reserved and not to occupy as their future home the lands north of the aforesaid division line, should be paid for the lands north of said aforesaid line at the same rate per acre as for the lands south of said division line after making due allowance for the three hundred thousand acres assigned south of the aforesaid division line. That the lands north of the said aforesaid line drawn due west of the Missouri River from the latitude where the Ayoway River disembogues out of the bluffs comprised largely in excess of three hundred thousand acres, said lands, in fact, comprising about eight hundred thousand acres, more or less. That the Omaha Tribe of Indians upon examination of the lands
4 north of the said described line decided that the same did not constitute and comprise a residence suited for and acceptable to them, the Omaha Tribe of Indians, and said fact was reported to the President of the United States, whereupon, pursuant to the aforesaid treaty of March 16, 1854, there was reserved and set apart a new location south of said line of approximately three hundred thousand acres as the future home of your petitioner, the Omaha Tribe of Indians, and upon which tract of land of three hundred thousand acres so set apart for them south of said line, less such lands as have been since sold pursuant to statutes in such cases made and provided, the Omaha Tribe of Indians are now located, and have had their home since the aforesaid treaty of March 16, 1854. That the United States did not pay, and never has paid or tendered to the Omaha Tribe of Indians, payment for the lands north of said described line in article 1 of the treaty of 1854, but without payment to the Omaha Tribe of Indians therefor, and without any lawful warrant therefor, and without obtaining a release or conveyance of the Omaha Tribe thereto, proceeded to, and did, sell the lands

north of said line as the property or public domain of it, the United States of America, under the preemption laws of the United States, and received therefor a sum of not less than one dollar and twenty-five cents per acre for each and every acre of land sold in the tract of country north of the line described in article 1 of the treaty of 1854, aforesaid, the same being less than the true value thereof, and the proceeds of said sales were covered into the Treasury of the United States to the credit of said United States. That in the matter of said lands and sales thereof the United States was the trustee of your petitioner, the Omaha Tribe of Indians, and was, and is, liable

to, and should account in law and equity to your petitioner,

5 the Omaha Tribe of Indians, for the entire amount it received for the lands north of said described line in article 1

of the treaty of 1854, less the amount received for three hundred thousand acres of said land, which said three hundred thousand acres belonged to the United States of America in lieu of the three hundred thousand acres of land assigned to your petitioner, the Omaha Tribe of Indians, south of the described division line aforesaid and to account to petitioner in the sum of one dollar and twenty-five cents per acre for such lands, if any, as the United States may have undertaken to dispose of for considerations other than money. That your petitioner is informed and believes that the amount of land in excess of said three hundred thousand acres north of the aforesaid described line is about five hundred thousand acres, more or less, and that the United States for said five hundred thousand acres, more or less, received a sum of not less than one dollar and twenty-five cents per acre, for which it should account to the Omaha Tribe of Indians, there being justly due, as claimed by your petitioner, to the Omaha Tribe of Indians on account of the matters and things aforesaid on a true and just accounting a sum of money amounting to not less than six hundred and twenty-five thousand dollars, and your petitioner, the Omaha Tribe of Indians, claims said sum of six hundred and twenty-five thousand dollars on account of the matters and things aforesaid, together with such further sum or sums, if any, as on a true and just accounting between your petitioner, the Omaha Tribe of Indians, and its trustee in such matter, the United States of America, it may be found the United States received for said lands north of the described line aforesaid after making due allowance to the United States of America for the

6 three hundred thousand acres north of said line to which it was entitled in lieu of the three hundred thousand acres assigned to your petitioner, the Omaha Tribe of Indians, south of the described division line aforesaid, your petitioner, the Omaha Tribe of Indians, further claiming interest at the rate of five per cent per annum on said sum or sums from the date of receipt thereof by the United States.

That the matters and things hereinbefore recited, and the line of division referred to between the lands north and south of said line

are fully set forth in article 1 of the aforesaid treaty executed March 16, 1854, said article 1 providing as follows:

"ARTICLE 1. The Omaha Indians cede to the United States all their lands west of the Missouri River, and south of a line drawn due west from a point in the center of the main channel of said Missouri River due east of where the Ayoway River disembogues out of the bluffs, to the western boundary of the Omaha country, and forever relinquishes all right and title to the country south of said line: Provided, however, That if the country north of said due west line, which is reserved by the Omahas for their future home, should not on exploration prove to be a satisfactory and suitable location for said Indians, the President may, with the consent of said Indians, set apart and assign to them, within or outside of the ceded country, a residence suited for and acceptable to them. And for the purpose of determining at once and definitely, it is agreed that a delegation of said Indians, in company with their agent, shall, immediately after the ratification of this instrument, proceed to examine the country hereby reserved, and if it please the delegation, and the Indians in council express themselves satisfied, then it shall be deemed

7 and taken for their future home; but if otherwise, on the fact being reported to the President, he is authorized to cause a new location, of suitable extent, to be made for the future home of said Indians, and which shall not be more in extent than three hundred thousand acres, and then and in that case, all of the country belonging to the said Indians north of said due west line, shall be and is hereby ceded to the United States by the said Indians, they to receive the same rate per acre for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line."

That your petitioner, the Omaha Tribe of Indians, did comply with each and every provision of article 1 of the treaty of March 16, 1854, aforesaid, and with each and every other provision of said treaty of March 16, 1854, aforesaid, but the United States of America, as hereinbefore set forth, did not comply with its stipulation and agreement to pay your petitioner, the Omaha Tribe of Indians, for the lands north of the hereinbefore-described line, but undertook to and did dispose of said lands to settlers and citizens of the United States of America without reference to the title thereto of your petitioner, the Omaha Tribe of Indians, and thereby became liable on an accounting to your petitioner as trustee with reference to said lands in and for your petitioner, the Omaha Tribe of Indians.

III.

8 That in and by the terms of the aforesaid treaty of March 16, 1854, provision was made for the execution of the cessions of land made by your petitioner, the Omaha Tribe of Indians, by article 1 of said treaty, and it was stipulated and agreed between the parties thereto that in consideration that the Omaha Tribe of In-

dians would remove within the period of one year from the date of ratification and proclamation of said treaty of March 16, 1854, that the United States would pay out and and expend for the benefit of the Omaha Tribe of Indians in their removal from the tract of land ceded by them as aforesaid to their new home the sum of forty-one thousand dollars in addition to the money agreed to be paid to the Omaha Tribe of Indians as consideration for the cessions of land agreed to be made by them by said treaty, and in addition would fence and break up two hundred acres of land for your petitioner, the Omaha Tribe of Indians, at their new home. That the defendant, the United States of America, did not, as matter of fact, expend the sum of forty-one thousand dollars as stipulated and agreed should be paid out and expended in and about the removal of your petitioner, the Omaha Tribe of Indians, from the tract of land ceded as aforesaid to their new home, and their subsistence for one year at their new home, together with the cost of exploration of the lands north of the division line aforesaid, and did not fence and break up two hundred acres of land at their new home for the benefit of your petitioner, the Omaha Tribe of Indians, as agreed to, but on the contrary your petitioner, the Omaha Tribe of Indians, was compelled at its own cost and expense and at serious injury to the life and health and comfort and convenience of your petitioner, the Omaha Tribe of Indians, and especially the aged and infirm members of said tribe of Indians, to remove themselves without aid or assistance from the United

States of America in and about the matter of said removal
9 from the ceded tract of land to their new home, and was compelled to subsist its own members, the Omaha Tribe of Indians, for one year at their new home without the agreed aid from the United States, and said United States further broke out and fenced for said Omaha Tribe of Indians at their new home a tract of land of not to exceed forty acres in the place and stead of two hundred acres of land which it agreed should be fenced and broken up for your petitioner, the Omaha Tribe of Indians, at their new home, whereby, and by reason whereof, your petitioner, the Omaha Tribe of Indians, claims that the defendant, the United States of America, is liable to and should account to your petitioner, the Omaha Tribe of Indians, for the sum of forty-two thousand dollars, more or less, together with interest on said sum from the 22d day of June, 1854, until paid.

That the provisions of the aforesaid treaty of March 16, 1854, which, it is claimed by your petitioner, the Omaha Tribe of Indians, were violated by the defendant, the United States of America, in the matter of the removal and subsistence of your petitioner, the Omaha Tribe of Indians, from the lands ceded by article 1 of the aforesaid treaty of March 16, 1854, to their new home, are as follows:

"ARTICLE 2. The Omahas agree, that as soon after the United States shall make the necessary provisions for fulfilling the stipulations of this instrument, as they can conveniently arrange their affairs, and not to exceed one year from its ratification, they will vacate the

ceded country, and remove to the lands reserved herein by them, or to the other lands provided for in lieu thereof, in the preceding article, as the case may be.

10 "ARTICLE 5. In order to enable the said Indians to settle their affairs and to remove and subsist themselves for one year at their new home, and which they agree to do without further expense to the United States, and also to pay the expenses of the delegation who may be appointed to make the exploration provided for in article first, and to fence and break up two hundred acres of land at their new home, they shall receive from the United States, the further sum of forty-one thousand dollars, to be paid out and expended under the direction of the President, and in such manner as he shall approve."

That your petitioner, the Omaha Tribe of Indians, did, as hereinbefore stated, comply with each and every provision of said articles 2 and 5, and each and every other article and provision of said treaty of March 16, 1854, but the United States, as herein set forth, did not comply with its stipulations and agreements as contained in said articles 2 and 5 of the aforesaid treaty of March 16, 1854, and under the terms of the jurisdictional act of June 22, 1910, is liable to account to your petitioner, the Omaha Tribe of Indians, therefor, at law and in equity, and your petitioner claims on said account the sum of forty-two thousand dollars, with interest thereon at the rate of five per cent per annum from the 22d day of June, 1854, until paid.

IV.

That the petitioner, the Omaha Tribe of Indians, has a just claim against the United States for the loss of life, limb, and liberty of members of said tribe, and of property of members of said
11 tribe of Indians, at the hands of the Sioux and other hostile tribes of Indians, protection from whom was guaranteed to the petitioners, the Omaha Tribe of Indians, by the United States by the terms of the aforesaid treaty of March 16, 1854, and the stipulations and agreements of which treaty the petitioner, the Omaha Tribe of Indians, complied with, but with the provisions of which treaty the United States failed to comply in that it failed to afford the protection to the petitioner, the Omaha Tribe of Indians, which it had guaranteed. That by article 7 of the aforesaid treaty of March 16, 1854, it was covenanted and agreed between the parties hereto, as follows:

"Article 7. Should the Omahas determine to make their permanent home north of the due west line named in the first article, the United States agree to protect them from the Sioux and all other hostile tribes, as long as the President may deem such protection necessary; and if other lands be assigned them, the same protection is guaranteed."

That said article in said treaty was entered into by virtue and by reason of the fact that it was represented by the petitioner, the Omaha Tribe of Indians, to the United States that said tribe of Indians was situated on the frontier between settlers on the outlying boundaries of the occupied portions of territory of the United States and warlike and hostile tribes of Indians, and that should the petitioner, the Omaha Tribe of Indians, enter into treaty engagements with the United States and endeavor, as said treaty contemplated, to adapt itself to the civilized mode of life of white citizens of the

United States, that it would occasion resentment against petitioner on the part of the Sioux and other hostile tribes of Indians, and that reprisals would be necessary on the part of

the petitioner, the Omaha Tribe of Indians, to protect the petitioner from said hostile tribes of Indians. That thereupon it was stipulated and agreed between the parties hereto that the petitioner, the Omaha Tribe of Indians, should refrain from hostilities, should place its protection under the direction of the United States and that the United States would guarantee to and would protect the petitioner in petitioner's efforts to adapt itself to a civilized and peaceful mode of life. That the petitioner, the Omaha Tribe of Indians, did endeavor to adopt a peaceful and civilized mode of life, and as a consequence thereof did incur the hostility of the Sioux and other hostile tribes of Indians situated near them. That said Sioux and other hostile tribes of Indians made assaults upon the person and property of the petitioner, the Omaha Tribe of Indians, and the petitioner appealed to the United States for the protection guaranteed by the United States, but no adequate and sufficient steps were taken by the United States under its guarantee, as aforesaid, and in consequence of the failure on the part of the United States to keep its guarantee contained in article 7 of the aforesaid treaty of March 16, 1854, the petitioner, the Omaha Tribe of Indians, from the date of the making of said treaty of 1854, suffered the loss of a large number of members of its tribe at the hands of hostile tribes of Indians, said total number of Indians whose lives were lost as aforesaid being about fifty. That a smaller number, estimated at about forty members of the Omaha Tribe of Indians, were wounded or taken prisoners by the Sioux and other hostile tribes of Indians, and property of the *of the*

Omaha Tribe of Indians to a value in excess of the sum of one hundred thousand dollars was lost to the Omaha Tribe of Indians, petitioner hereto, by the depredations of the Sioux and other hostile tribes of Indians subsequent to the aforesaid treaty of March 16, 1854, and in large part in consequence of the execution of said treaty and a faithful observance of its stipulations by petitioner, the Omaha Tribe of Indians. That complaint repeatedly was made, and the failure of the United States to afford the protection guaranteed was repeatedly called to the attention of the agents, officers, and servants of the United States, and the same was called to the attention of the chief executive authorities of the United

States, but while it was admitted that protection was necessary and should be afforded to the petitioner, the Omaha Tribe of Indians by the United States, the same was not afforded as covenanted by article 7 aforesaid.

That the names of some of the Omaha Indians who were killed by hostile tribes of Indians subsequent to the making of the aforesaid treaty of March 16, 1854, were as follows: Mununkaka and wife, Mushkaaca, Binzategra, Tahagaca, Agahamone, Othacaa, Zhanshada, Red Shield, Logan Fontenelle, Zeleke, Semekase, Nunkanah, Wanuzaba, Hundunmoni, Monchoo-wanuca, Hashathaga's wife, Munshukane's wife, Tanuzhis's wife, Big Turtle's wife, Monchowanca's mother, Hacagaska, Mucawatha's mother.

That the names of others who were taken prisoners of war by hostile tribes of Indians were as follows: Ebagemba's wife and Nathaniel Burt.

That the names of others who were wounded or scalped were as follows: Hacago, badly wounded; Schedoba, Hashathaga; one woman, name unknown, scalped; Gachezheethu-Charles Robinson; Humthiszginga; Waxiga; Keshtawgo; Wasogetha; Ithecoda; Tabeah's wife; Metace; Mucpemoni and Meahconda.

That besides those whose names are given herein, other members of the Omaha Tribe of Indians whose names petitioner is not able at this time to set forth, were killed or wounded to a total number of about fifty Indians killed, more or less, and about forty Indians wounded, more or less.

That the property stolen or captured by hostile tribes of Indians included about one thousand horses of the Omaha Tribe of Indians, more or less, and many of which horses were not ponies, but of a superior breed.

That at the time of the execution of the aforesaid treaty of March 16, 1854, there had been a regulation proposed by the United States, defendant hereto, and agreements had been entered into by Indian tribes in Nebraska where was the home of petitioner, fixing the sum of one thousand dollars as the price to be paid by one tribe of Indians to another tribe of Indians for members of the tribe who might be killed by members of the other tribe of Indians, and said amount, it was understood and agreed between representatives of petitioner, the Omaha Tribe of Indians, and the officials of the Government of the United States, should be the measure of damages suffered by petitioner, the Omaha Tribe of Indians, for and in consequence of the loss of life, limb, and liberty on the part of the petitioner, the Omaha Tribe of Indians, through observance by it, the petitioner, of its agreement with the United States in and by the treaty aforesaid of March 16, 1854, not to continue warlike operations against the Sioux and other hostile tribes of Indians, but to rely for protection upon the guarantee of the United States.

Wherefore, the petitioner claims that the United States of America, defendant hereto, has violated the terms of its treaties with the petitioner, the Omaha Tribe of Indians, to the dam-

age of the Omaha Tribe of Indians in the sum of fifty thousand dollars for loss of life of members of the Omaha Tribe of Indians; of forty thousand dollars for loss of limb or body by petitioner, the Omaha Tribe of Indians; and the sum of one hundred thousand dollars for loss of property by the petitioner, the Omaha Tribe of Indians, at the hands of the Sioux and other hostile tribes of Indians, the whole of said claim of this paragraph of the claims of petitioner, the Omaha Tribe of Indians, aggregating the sum of one hundred and ninety thousand dollars on a true and just accounting between the petitioner or claimant herein, the Omaha Tribe of Indians, and the defendant, the United States of America.

V.

That petitioner, the Omaha Tribe of Indians, has a just claim against the United States of America in the sum of fifty thousand dollars for timber on the lands of the petitioner, the Omaha Tribe of Indians, destroyed by settlers, citizens of the United States of America. That it became and was the duty of the United States of America subsequent to the execution of the aforesaid treaty of March 16, 1854, to protect the Omaha Tribe of Indians and the timber belonging to said tribe upon the reservation of three hundred thousand acres of land guaranteed to them as a new home by the aforesaid treaty of March 16, 1854, against spoliation, but the United States of America, in violation of the terms and provisions of said 16 treaty, permitted petitioner, the Omaha Tribe of Indians, to be spoliated of valuable oak, walnut and other timbers upon its aforesaid reservation of three hundred thousand acres to an amount aggregating in value fifty thousand dollars. Wherefore, the petitioner, the Omaha Tribe of Indians, sues the United States of America and claims the sum of fifty thousand dollars on account of timber of petitioner destroyed by citizens of the United States of America in violation of the terms of treaty stipulations between the parties hereto and the obligations and duties of the United States as trustee and guardian of your petitioner.

VI.

That the petitioner, the Omaha Tribe of Indians, claims the sum of thirty thousand dollars from the defendant hereto, with interest on the same from January 1, 1857, to date, at the rate of five per cent per annum, on account of funds of petitioner, the Omaha Tribe of Indians, misappropriated in the year 1856 by an agent of the United States, which said funds in the sum of approximately thirty thousand dollars were not used for purposes for the material benefit of petitioner, the Omaha Tribe of Indians, and were not paid by the United States to the Omaha Tribe of Indians, though due, but were misappropriated by an agent of the United States to his own personal use in or about the year 1856, and recompense therefor never made by defendant, the United States of America, to petitioner. Where-

fore, petitioner claims on an accounting the sum of thirty thousand dollars, with interest thereon from the date of said misappropriation to be due petitioner, the Omaha Tribe of Indians, from the United States of America.

17

VII.

That the petitioner, the Omaha Tribe of Indians, claims on an accounting from the defendant, the United States of America, that there is due to petitioner, the Omaha Tribe of Indians, the sum of twenty-five thousand dollars for subsistence furnished by the defendant, the United States of America, to the Ponca and the Winnebago tribes of Indians from the funds, lands, and property of the Omaha Tribe of Indians in and about the years 1864 to 1866, inclusive. Wherefore, the petitioner sues the United States of America and demands on account of the matters and things set forth in this paragraph the sum of twenty-five thousand dollars.

VIII.

That the petitioner, the Omaha Tribe of Indians, claims from the United States of America the sum of five thousand dollars for misappropriation of funds of said tribe for purposes not for the material benefit of said tribe, arising out of misconduct of an agent of the United States to the claimant tribe of Indians in, to wit, the year 1874, whereby, in violation of treaties between the petitioner, the Omaha Tribe of Indians, and the United States, and in violation of its duty to the petitioner as trustee, the United States of America through its Indian agent to petitioner, the Omaha Tribe of Indians, delivered to petitioner a large number of worn out, worthless cattle and oxen, in or about the year 1874, and compelled the petitioner, the Omaha tribe of Indians, to receipt for said cattle and oxen, that were in a dying condition, and to receipt for dead cattle and oxen.

18 That the aforesaid matter was repeatedly called, within a reasonable time of the date thereof, to the attention of the defendant, the United States of America, and redress was promised to petitioner, but compensation therefor never was made to petitioner, the Omaha Tribe of Indians. Wherefore, petitioner, the Omaha Tribe of Indians, claims on an accounting between it, the Omaha Tribe of Indians, and the United States of America, the sum of five thousand dollars on account of the matters and things set forth in this paragraph of its petition.

IX.

That petitioner, the Omaha Tribe of Indians, claims a further sum due to it, the Omaha tribe of Indians, from the United States on an accounting between them for funds of the United States misappropriated for purposes not for its material benefit, and for moneys charged up contrary to treaty stipulation to the petitioner, the Omaha

Tribe of Indians, which should be charged to the United States of America on a true accounting between them. That petitioner is unable to state at this time the details of said matters of accounting, save that certain of said matters concern wagons furnished petitioner, the Omaha Tribe of Indians, by the United States in or about the year 1874, and that were grossly unfit for use and fraudulently overvalued, and for buildings charged against the funds of petitioner, the Omaha Tribe of Indians, though properly chargeable to the United States, but claims on full accounting the sum of not less than twenty-thousand dollars as due to the petitioner, the Omaha Tribe of Indians, on a true and just accounting between petitioner and the United States under provisions of the act of June 22, 1910, referring this cause to this court.

19

X.

RECAPITULATION.

Claim I: For lands north of the division line established by article 1 of the treaty of March 16, 1854, taken by the United States as trustee for petitioner, sold by the United States and the proceeds misappropriated to the credit of the United States and not accounted for to the petitioner, the Omaha Tribe of Indians, six hundred and twenty-five thousand dollars, with interest-----	\$625,000. 00
Claim II: For moneys agreed to be expended under the terms of the treaty of March 16, 1854, in the removal of petitioner, the Omaha, Tribe of Indians, from its lands ceded by the treaty aforesaid to the new home of petitioner and subsistence thereon, but not expended as agreed, forty-two thousand dollars, with interest -----	42,000. 00
Claim III: For failure to protect the life, limb and property of petitioner as guaranteed by the United States, one hundred and ninety thousand dollars-----	190,000. 00
Claim IV: For timber of petitioner spoliated by defendant or its citizens, fifty thousand dollars-----	50,000. 00
Claim V: For funds of petitioner misappropriated by the 20 agents of the United States and expended for the personal benefit of said agents of the United States and not paid to or expended for purposes of material benefit to petitioner, thirty thousand dollars-----	30,000. 00
Claim VI: For subsistence compelled to be furnished by petitioner to the Ponca and Winnebago Tribes of Indians, contrary to treaty stipulations and the duty of the United States of America, twenty-five thousand dollars-----	25,000. 00
Claim VII: For funds of petitioner misappropriated for purposes not for its material benefit and violation of the duty of the United States as to cattle and oxen supplied to petitioner, or charged to petitioner, five thousand dollars-----	5,000. 00
Claim VIII: For amount due on a true accounting between petitioner and the United States, twenty-five thousand dollars-----	25,000. 00
Total-----	\$992,000. 00

in which aforesaid sum of \$992,000 petitioner, the Omaha Tribe of Indians, prays this court to decree the defendant, the United States of America, indebted to the Omaha Tribe of Indians, on an accounting between them, and that petitioner may have such other and further relief as the nature of the cause of petitioner may require and as to this honorable court may seem meet and proper.

21

XI.

That in and by the aforesaid act of June 22, 1910, referring the claims of petitioner, the Omaha Tribe of Indians, against the United States, to this court, it was provided that this court should fix the fee or compensation to be paid by petitioner, the Omaha Tribe of Indians, to the attorneys representing petitioner in this cause.

That in and by the aforesaid jurisdictional act approved June 22, 1910, it was provided:

"The petition (in this cause) shall be verified by the attorney employed by the said Omaha Indians, to prosecute their claims under this act, under contract approved by the Commissioner of Indian Affairs and the Secretary of the Interior, as provided by law.

* * * Upon the final determination of the cause the Court of Claims shall decree such fees as the court shall find to be reasonable to be paid to the attorney or attorneys employed by the said tribe of Indians, and the same shall be paid out of any sum or sums found due said Omaha Tribe of Indians: Provided, That in no case shall the fees decreed by said court be in excess of the amount stipulated in the approved contract nor amount to more than ten per centum of the amount of the judgment recovered in such cause."

That petitioner, pursuant to the terms of the aforesaid act approved June 22, 1910, entered into a contract with the law firm of Kappler & Merillat, consisting of Charles J. Kappler and Charles H. Merillat, of Washington, D. C., and Hiram Chase, as attorneys of petitioner in this cause. That said contract was approved by the

22 Commissioner of Indian Affairs and the Secretary of the Interior in an amount not to exceed ten per centum of the amount of the judgment recovered in this cause, but in no event to exceed the sum of twenty-five thousand dollars. That petitioner prays this court upon a final determination in this cause to fix the fees to be paid by the petitioner, the Omaha Tribe of Indians, to the attorneys herein named in accordance with the terms of the contract between them and the statute in this case made and provided.

Wherefore the petitioner prays for judgment against the United States in the total sum of nine hundred and ninety-two thousand dollars, with interest on the several amounts herein as claimed, and for such further relief as petitioner, the Omaha Tribe of Indians, may be entitled to receive against the defendant hereto, the United States

of America, both at law and in equity in the premises and that the court decree the fee to be paid the attorneys representing petitioner.

THE OMAHA TRIBE OF INDIANS,
Petitioner.

By their Attorney, Hiram Chase.

KAPPLER & MERILLAT,
Attorneys for Petitioner.

HIRAM CHASE,
of Counsel.

23 COUNTY OF THURSTON,
State of Nebraska, ss:

Hiram Chase, being first duly sworn, deposes and says: That he is a member of the Omaha Tribe of Indians and an attorney-at-law by profession; that he is one of the attorneys employed by the said Omaha Tribe of Indians to prosecute its claims against the United States of America under an act of Congress approved June 22, 1910; that said contract of attorneyship has been approved by the Commissioner of Indian Affairs and the Secretary of the Interior, as required by law; that affiant has read the foregoing petition setting forth the claims of the petitioner, the Omaha Tribe of Indians, against the United States, and that upon information and belief affiant avers the facts stated in the foregoing petition are true to the best of his knowledge, information, and belief.

HIRAM CHASE.

Subscribed and sworn to before me, this 15th day of June, A. D. 1911.

A. P. COLEMAN,
Notary Public.

[SEAL.]

24

II. General traverse.

Court of Claims.

THE OMAHA TRIBE OF INDIANS,

vs.

THE UNITED STATES.

No. 31002.

No demurrer, plea, answer, counterclaim, set-off, claim of damages, demand, or defense in the premises, having been entered on the part of the defendants, a general traverse is entered as provided by rule 34.

III. Defendants' counterclaim. Filed Nov. 27, 1917.

Now come the defendants, by their Attorney General, and allege that the Omaha Tribe of Indians, the plaintiffs in this cause, was at the commencement of this suit and still is justly indebted unto the United States in the sum of \$58,800, being the value of the reservation con-

taining 300,000 acres of land set apart for said Omaha Tribe of Indians on the Missouri River, at Black Bird Hills, Nebraska, in lieu of the same number of acres of land reserved by the treaty of March 16, 1854 (10 Stat., 1043), north of the line drawn due west from the mouth of Aoway Creek for the home of said tribe upon the
 25 ground that the lands so reserved north of said Aoway Creek line was not the property of the Omaha Tribe, but belonged to the Ponca Tribe of Indians at the date of said treaty, and the consideration for the grant of said reservation to said Omaha Tribe, as aforesaid, totally failed.

Wherefore the defendants file this counterclaim and pray judgment against plaintiff, the Omaha Tribe of Indians, in the sum of \$58,800.

HUSTON THOMPSON,
Assistant Attorney General.

IV. Replication. Filed in open court, April 4, 1918.

Now come the claimants and for replication to the counter claim filed herein by the United States, deny that the Omaha Tribe of Indians, petitioners, is indebted to the United States in any sum whatsoever as set forth in said counterclaim, and deny that the lands north of Aoway Creek, reserved by the treaty of 1854 as a home for the Omaha Indians, did not belong to the said Indians, and state that the same did belong to the said Omaha Tribe of Indians and their rights thereto were recognized and conceded to them by the United States, by its officials acting for it in the making of the treaty for the cession of the same to the United States, and that said United States under said treaty did take possession of, claim, and appropriate to itself under said treaty with the petitioners the lands embraced within the alleged counter claim.

KAPPLER & MERILLAT,
 HIRAM CHASE,
Attorneys for Petitioners.

COUNTY OF —,

State of Nebraska, ss:

26 Hiram Chase, being first duly sworn, deposes and says:
 That he is one of the attorneys for the Omaha Tribe of Indians, claimants in the above entitled cause, and also a member of said tribe of Indians, and that according to the best of his knowledge, information, and belief the matters and things set forth in the above replication signed by him are true.

HIRAM CHASE.

Subscribed and sworn to before me this 30th day of March, 1918.
 [SEAL]

HARRY A. WALTERS,
Notary Public.

My commission expires June 9, 1920.

V. History of proceedings.

On April 4, 1918 this case was argued and submitted on merits by Mr. Charles H. Merillat, for the claimants, and by Mr. George M. Anderson, for the defendants.

On April 22, 1918 the court handed down findings of fact and conclusion of law, and entered judgment for the claimants in the sum of \$122,295.31, with an opinion by Hay, J.

On May 21, 1918 the defendants filed a motion for amendment of findings and for a new trial.

On June 10, 1918, the court filed an order allowing in part and overruling in part the defendants' motion to amend findings.

Former findings, judgment, and opinion were withdrawn and 27 new findings, conclusions of law and judgment entered for claimants in the sum of \$122,295.31, with an opinion by Hay, J., which are as follows:

VI. Findings of fact, conclusion of law, and by Hay, J. Filed June 10, 1918.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following

Findings of fact.

I.

The act of Congress approved June 22, 1910, provided as follows:

"That all claims of whatsoever nature which the Omaha Tribe of Indians may have or claim to have against the United States may be submitted to the Court of Claims, with the right of appeal to the Supreme Court of the United States by either party, for determination of the amount, if any, due said tribe from the United States under the treaty between the United States and the said tribe of Indians, ratified and affirmed March 16, 1854, or under any other treaties or laws, or for misappropriation of any funds of said tribe not for its material benefit, or for failure of the United States to pay said tribe any money due; and jurisdiction is hereby conferred upon the Court of Claims to hear and determine all legal and equitable claims, if any, of said Omaha Tribe of Indians against the United States, and also any legal or equitable defense, set-off, or counterclaim which the United States may have against said tribe, and to enter judgment thereon. The Court of Claims shall advance said cause upon the docket, and shall have authority to settle the rights, both legal and equitable, of both the Omaha Tribe of Indians and the United States, notwithstanding lapse of time or statutes of limitation, and the final judgment and satisfaction thereof shall be a full settlement of all claims of said Omaha Indians against the United States."

II.

The treaty between the United States and the Omaha Tribe of Indians of March 16, 1854, provides:

"ARTICLE 1. The Omaha Indians cede to the United States all their lands west of the Missouri River and south of a line drawn due west from a point in the center of the main channel of said Missouri River due east of where the Ayoway River disembogues out of the bluffs, to the western boundary of the Omaha country, and forever relinquish all right and title to the country south of the line: Provided, however, that if the country north of said due west line, 28 which is reserved by the Omahas for their future home, should not, on exploration, prove to be a satisfactory and suitable location for said Indians, the President may, with the consent of said Indians, set apart and assign to them, within or outside of the ceded country, a residence suited for and acceptable to them. And for the purpose of determining at once and definitely, it is agreed that a delegation of said Indians, in company with their agent, shall, immediately after the ratification of this instrument, proceed to examine the country hereby reserved, and if it please the delegation, and the Indians in council express themselves satisfied, then it shall be deemed and taken for their future home; but if otherwise, on the fact being reported to the President, he is authorized to cause a new location, of suitable extent, to be made for the future home of said Indians, and which shall not be more in extent than three hundred thousand acres, and then and in that case, all of the country belonging to the said Indians north of said due west line, shall be and is hereby ceded to the United States by the said Indians, they to receive the same rate per acre for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line.

"ARTICLE 2. The Omahas agree that so soon after the United States shall make the necessary provision for fulfilling the stipulations of this instrument, as they can conveniently arrange their affairs, and not to exceed one year from its ratification, they will vacate the ceded country, and remove to the lands reserved herein by them, or to the other lands provided for in lieu thereof, in the preceding article, as the case may be."

III.

The Omaha Indians were not satisfied with the country to the north of the due west line mentioned in article 1 of the treaty of March 16, 1854, and duly elected to take for their future home a tract of country of 300,000 acres south of said line. This fact was reported to the President and by his direction a tract of 300,000 acres south of said line was set apart for the Omaha Indians.

The area of land north of the due west line mentioned in article 1 of the aforesaid treaty is 783,365 acres which belonged to said Omaha Indians, and after deducting therefrom the 300,000 acres set apart for the Omaha Indians in accordance with the provisions of

the aforesaid treaty there is an excess of 483,365 acres for which the Omaha Indians have not been paid.

The price per acre which the United States agreed to pay for this excess of land is 19.6 cents, and amounts to the sum of \$94,739.54.

IV.

The treaty between the United States and the Omaha Tribe of Indians of March 16, 1854, provides:

"ARTICLE 5. In order to enable the said Indians to settle their affairs and to remove and subsist themselves for one year at their new home, and which they agree to do without further expense to the United States, and also to pay the expenses of the delegation who may be appointed to make the exploration provided for in article first, and to fence and break up two hundred acres of land
29 at their new home, they shall receive from the United States the further sum of forty-one thousand dollars, to be paid out and expended under the direction of the President, and in such manner as he shall approve."

There was expended by the officials of the Government in carrying out the provisions of the above article of the treaty the sum of \$23,453.21; the balance of the \$41,000 agreed to be paid by said article to the Omahas, together with other moneys of said tribe, remained in the hands of the Indian agents and are carried over to the item of the claim of the plaintiffs dealing with misappropriation of Omaha moneys by Indian agents, the facts pertaining to which will be found in Finding VII.

V.

The treaty between the United States and the Omaha Tribe of Indians of March 16, 1854, in the seventh article thereof provides that: "Should the Omahas determine to make their permanent home north of the due west line named in the first article the United States agree to protect them from the Sioux and all other hostile tribes as long as the President may deem such protection necessary, and if other lands be assigned them the same protection is guaranteed."

After the treaty of 1854, and after the Omahas had removed to their new homes, the Sioux made repeated attacks upon them in the year of removal and subsequent years. The United States were called upon by the Omahas to protect them as was provided in the treaty. No protection of any kind was afforded the Omahas by the United States. Protection was necessary as soon as the Omahas removed to their new home and for several years thereafter. The Sioux killed 22 Omahas and stole 152 horses. The Winnebagoes stole from the Omahas 173 horses for which they have been paid. The average value of horses and ponies at that time was \$30 per head. It does not appear what price one tribe should pay to another for killing a member of the tribe. One hundred and fifty-two horses at \$30 per head amounts to the sum of \$4,560.

VI.

There was a large amount of timber stolen from the Omaha reservation by Omaha Indians without the knowledge or consent of the agent.

VII.

Two of the Indian agents of the United States who were charged with the disbursement of Omaha treaty funds to the Omahas defaulted with funds belonging to the Omahas in the sum of \$18,202.19. Agent Hepner defaulted in the sum of \$15,068.80 on August 3, 1856, and Agent Robertson defaulted in the sum of \$3,133.39 on August 11, 1858. The United States has never repaid to the Omahas the aforesaid sum of \$18,202.19.

VIII.

James P. Williams under this contract of June 1, 1867, delivered on September 10, 1867, to Superintendent H. B. Denman at Omaha, Nebr., 103 head of stock cattle, for which he was paid \$3,432.99 out of money belonging to the Omahas. These cattle when they reached the reservation were in bad condition and 50 of them died. These cattle were of an average value of \$33.33 per head. Fifty cattle were worth the sum of \$1,666.50.

IX.

In 1875 an infirmary was constructed upon the Omaha and Winnebago consolidated reservation. It appears that this building was not used, and it was not such a building as was contemplated by the treaties between the United States and the Omaha Tribe of Indians. This building cost \$4,738, of which \$3,127.08 was paid out of money belonging to the Omahas and \$1,610.92 out of the money belonging to the Winnebagoes.

Conclusion of law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the plaintiffs are entitled to recover the amount shown in Finding III, to wit, the sum of \$94,739.54; the amount shown in Finding V, to wit, the sum of \$4,560; the amount shown in Finding VII, to wit, the sum of \$18,202.19; the amount shown in Finding VIII, to wit, the sum of \$1,666.50; and the amount shown in Finding IX, to wit, the sum of \$3,127.08. It is therefore adjudged and ordered that the plaintiffs recover of and from the United States the sum of one hundred and twenty-two thousand two hundred and ninety-five dollars and thirty-one cents (\$122,295.31).

Opinion.

HAY, *Judge*, delivered the opinion of the court:

This case is here for decision by virtue of an act of Congress approved June 22, 1910, which act is set out in full in Finding I.

On March 16, 1854, the United States entered into a treaty with the Omaha Tribe of Indians. By the first article of this treaty it is provided that the Omaha Indians cede to the United States all their lands west of the Missouri River and south of a line drawn due west from a point in the center of the main channel of that river due east of where the Ayoway River disembogues out of the bluffs to the western boundary of the Omaha country. The treaty further provides that if the country north of said due west line should not prove a satisfactory and suitable location for the Omaha Indians the President may, with the consent of the Indians, set apart and assign to them within or outside of the ceded country a residence suited for and acceptable to them, which shall not be more in extent than 300,000 acres. Then in that case all of the country belonging to said Indians north of the due west line shall be ceded to the United States, and the United States agreed to pay the same per acre for it as they agreed to pay for the land south of said line, after deducting from the land so ceded the number of acres set apart for said Indians.

From the evidence in this case it appears that the number of acres belonging to the Omaha Indians north of the due west line, and ceded by them to the United States, was 783,365; the number of acres set apart for them under the terms of the treaty south of the due west line was 300,000, leaving 483,365 acres, for which the United States agreed to pay them the same price per acre as they agreed to
31 pay for the land ceded south of said due west line. The land ceded by the Omahas to the United States south of said line contained 4,500,000 acres, for which the United States agreed to pay the sum of \$881,000, thus making the treaty price nineteen and six-tenths cents per acre.

It does not appear, nor is it contended by the defendants, that they have ever paid anything to the Omaha Indians by virtue of this treaty. The contention of the defendants is that the Omaha Indians never owned any land north of the due-west line above referred to, and never had the right to cede the land to the defendants. At the time the treaty was made the United States recognized the Omahas as having title to this land north of the due-west line, and specifically promised to pay for it. Those making the treaty for the United States were well acquainted with the country; they knew what the Omahas claimed; they knew that their possession and occupation of this land was considered with reference to their habits and modes of life; that the Indians had a right to the exclusive enjoyment of it in their own way until they abandoned the land or ceded it to the Government; their right of occupancy was considered as firmly established—this the treaty makers on behalf of the Government recognized when this treaty was made, and the defendants can not

now be heard to say that the Indians did not own the land when the treaty was made and had no right to make a cession of it.

The treaty provides that the United States shall pay to the Omaha Indians the sum of \$41,000 to enable the Indians to remove and subsist themselves for one year in their new home, and for other purposes set forth in the fifth article of the treaty. The Government expended \$23,453.21 in carrying out the provisions of the treaty; the balance of the \$41,000 was placed in the hands of the Indian agents of the Government to be expended for the purposes set out in the treaty. It appears that these agents misappropriated the sum of \$18,068.80, and that amount was never accounted for nor expended for the benefit of the Indians. The Indians are entitled to this money.

The amounts found to be due the Indians in the fifth, seventh, eighth, and ninth findings are supported by the evidence, and are allowed under the provisions of the treaty of March 16, 1854.

A judgment will therefore be entered for the sum of \$122,295.31. It is so ordered.

32

VII. Judgment of the court.

At a Court of Claims held in the City of Washington on the tenth day of June, A. D. 1918, judgment was ordered to be entered as follows:

The court, upon due consideration of the premises find in favor of the claimants, and do order, adjudge, and decree that the Omaha Tribe of Indians, as aforesaid, are entitled to recover and shall have and recover of and from the defendants, the United States, the sum of one hundred and twenty-two thousand two hundred and ninety-five dollars and thirty-one cents (\$122,295.31).

BY THE COURT.

VIII. Proceedings had after entry of judgment.

On June 11, 1918 the claimants filed a motion for an amendment of findings and for a new trial, which motion was overruled by the court on June 17, 1918.

33 *IX. Defendants' application for, and allowance of, appeal.*

From the judgment rendered in the above-entitled cause on the 10th day of June, 1918, in favor of the claimant, the defendants, by their attorney general, on the 12th day of July, 1918, make application for, and give notice of, an appeal to the Supreme Court of the United States.

HUSTON THOMPSON,
Assistant Attorney General.

Filed July 12, 1918.

Ordered: That the above appeal be allowed as prayed for.

EDWARD K. CAMPBELL,
Chief Justice.

Oct. 21, 1918.

X. Claimants' application for, and allowance of, cross-appeal.

Now comes the petitioner in the above-entitled cause, the Omaha Tribe of Indians, by its attorneys, Kappler & Merillat (Charles H. Merillat & Charles J. Kappler), and moves the court for an allowance of an appeal to the Supreme Court of the United States in the above-entitled cause, or, in the alternative, for the allowance of a cross-appeal to the Supreme Court of the United States in the event that the court heretofore has allowed an appeal to the defendant herein.

THE OMAHA TRIBE OF INDIANS,
By C. J. KAPPLER & C. H. MERILLAT,
Attorneys.

Filed August 23, 1918.

Ordered: That the above appeal be allowed as prayed for.

EDWARD K. CAMPBELL,
Chief Justice.

Oct. 21, 1918.

34

Court of Claims.

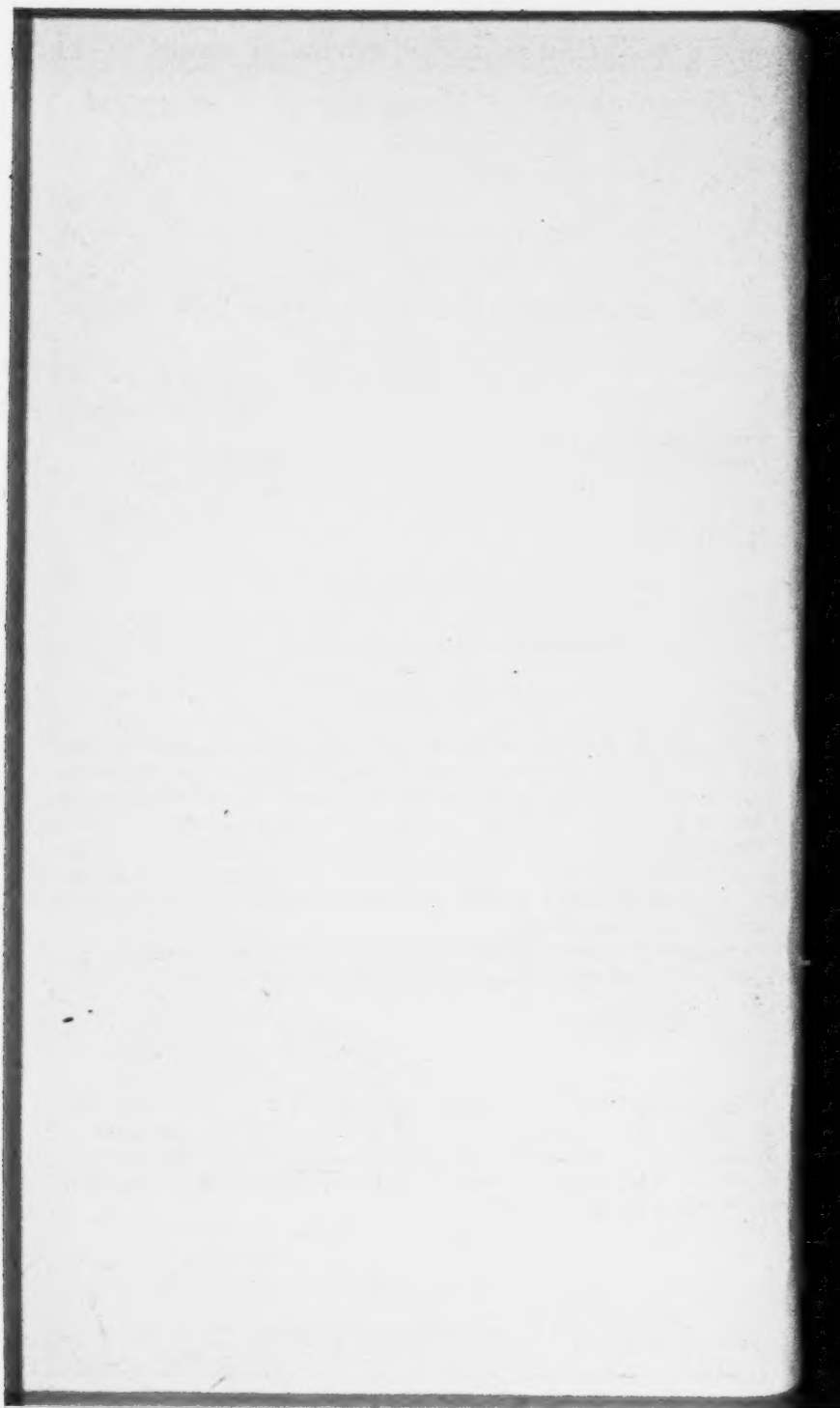
THE OMAHA TRIBE OF INDIANS }
vs. } No. 31002.
THE UNITED STATES. }

I, Samuel A. Putman, chief clerk, Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the argument and submission of case; of the findings of fact, conclusion of law, and opinion of the court; of the judgment of the court; of the defendants' application for, and allowance of, an appeal to the Supreme Court of the United States, and of the claimants' application for, and allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at Washington City, this 24 day of October, A. D. 1918.

SAMUEL A. PUTMAN,
Chief Clerk Court of Claims.

(Endorsed:) File No. 26,823. Court of Claims. Term No. 737. The United States, appellant, vs. The Omaha Tribe of Indians. File No. 26,824. Term No. 738. The Omaha Tribe of Indians, appellant, vs. The United States. Filed November 20th, 1918. File Nos. 26,823 and 26,824.



In the Supreme Court of the United States.

OCTOBER TERM, 1919.

THE UNITED STATES, APPELLANT,	} No. 243.
v.	
THE OMAHA TRIBE OF INDIANS, APPELLEE.	

APPEAL FROM THE COURT OF CLAIMS.

APPELLANT'S MOTION FOR AN ORDER ON THE COURT OF CLAIMS TO MAKE AND CERTIFY ADDITIONAL FINDINGS OF FACT AND BRIEF.

The appellant, by the Solicitor General, moves the court for an order directed to the Court of Claims requiring the said court to make and certify as part of the record here, findings of fact on the following questions of fact, to wit:

I.

Whether the lands north of the due west line from the mouth of Aoway Creek bounded on the south by the said due west line, on the east and north by the Missouri River, and on the west by a straight line from the mouth of the Niobrara River to the said due west line, containing 783,365 acres, belonged at the date of the treaty of March 16, 1854, by the Indian title of occupancy and possession to the Omaha or Ponca Tribe of Indians?

II.

Whether or not the Indian title to said lands was afterwards conceded by the United States to be in the Ponca Tribe of Indians and ceded by said tribe to the United States by the treaty of March 12, 1858?

STATEMENT.

Among others the following findings of fact were requested by appellant in the Court of Claims:

By treaty between the United States and the Ponca Tribe of Indians of March 12, 1858, it was provided:

ARTICLE 1. The Ponca Tribe of Indians hereby cede and relinquish to the United States all the lands now owned or claimed by them, wherever situate, except the tract bounded as follows, viz: Beginning at a point on the Niobrara River and running due north, so as to intersect the Ponca River twenty-five miles from its mouth; thence from said point of intersection, up and along the Ponca River, twenty miles; thence due south to the Niobrara River; and thence down and along said river to the place of beginning; which tract is hereby reserved for the future home of said Indians.

By the above treaty the Ponca Indians ceded to the United States all of those lands theretofore possessed by them bounded on the west by the east line of the Sioux Nation, as established by the Laramie treaty of 1851, from the forks of the Platte to the mouth of

the White River; on the north and east by the Missouri River; and on the south by the due west line from the mouth of Aoway Creek to the Sioux east line.

X.

The Poncas were in possession of and hunted over from time immemorial all of that country bounded by the Missouri River on the north and east, by the due west line from the mouth of Aoway Creek on the south, and by the east line of the Sioux Nation, established by the Laramie treaty of 1851, on the west.

The Omaha country was bounded on the north by the due west line from the mouth of Aoway Creek, on the east by the Missouri River, on the south by the Platte River, and on the west by Shell Creek and a line drawn due north from the headwaters of Shell Creek to the Aoway Creek due west line, and contained 4,500,000 acres of land, for which they were paid \$881,000 in money, at the rate of \$19.6 per acre.

After the findings were made by the court, the Government filed its motion for an amendment thereof, requesting that Finding III be amended as follows:

III.

In lieu of the second paragraph thereof:

The area north of the due west line from the mouth of Aoway Creek, south and west of the Missouri River and east of a line drawn

due south from the mouth of the Niobrara River, contains 780,300 acres, which, after deducting therefrom the 300,000 acres set apart for the Omahas, in accordance with the provisions of said treaty, left an excess of 482,300, for which the Omahas have not been paid.

To be added at the end of said Finding No. III:

The country north of the due west line aforesaid, at the time the treaty of March 16, 1854, was made with the Omahas, belonged to the Ponca Tribe of Indians by the ordinary and usual Indian title of occupancy and possession, and prior to the making of said treaty had never been possessed or claimed by the Omahas. Mr. Manypenny in his report to the Secretary of the Interior in 1854 stated that the northern boundary of the Omaha cession was 42 degrees 40 minutes north latitude. The area between the due west line aforesaid and 42 degrees 40 minutes amounted to 327,680 acres.

This motion was overruled.

ALEX. C. KING,
Solicitor General.

FRANK DAVIS, Jr.,
Assistant Attorney General.

BRIEF.

This suit was brought in the Court of Claims under a special jurisdictional act approved June 22, 1910 (36 Stat. 540; Rec. p. 15). The claim consisted of a number of items, but this motion relates only to item No. 1, claiming compensation for certain lands alleged to have been ceded by the Omaha tribe to the United States by Article I of the treaty of March 16, 1854, lying north of the line drawn due west from the mouth of Aoway Creek, in the State of Nebraska, near where the city of Ponca now stands. (10 Stat. 1043; Rec. 16.)

At the trial of the case in the Court of Claims, the United States submitted to the court evidence beyond question sufficient to establish the fact that the Omaha Tribe had never owned, claimed, or possessed any lands north of said due west line from the mouth of Aoway Creek, prior to the date of the treaty of March 16, 1854, but that the lands in question had been from time immemorial to the date of said treaty owned by the Ponca Tribe by the ordinary and usual Indian title of occupancy and possession.

The Court of Claims, however, refused to go into the question of the Indian title to said lands or allow the evidence to be discussed, upon the ground that the United States was estopped from denying the ownership of said lands by the Omaha Tribe by the treaty of 1854.

The only evidence considered by the lower court related to the acreage of the lands north of the due west line from the mouth of Aoway Creek which it found to be 783,365 acres, and the acreage and price of the lands south of said due west line stated in the opinion as 4,500,000 acres at \$0.196 per acre, amounting to \$881,000 (Rec. pp. 16, 19). The opinion of the lower court therefore as to item No. 1 is confined to conclusions of fact and law drawn from Article I of the treaty of March 16, 1854, and these conclusions are not justified by the language of the treaty.

By Article I of the treaty of March 16, 1854 (Rec. 16), the Omahas ceded absolutely to the United States all of their lands west of the Missouri River and south of the line drawn due west from the main channel of said river where Aoway Creek flows into it, with a proviso that if the country north of said due west line should not on exploration prove satisfactory and suitable to said Indians, the President should set apart for them a reservation within or outside of the ceded country, and for the purpose of determining whether the country was suitable a delegation of said Indians was to be, immediately after the ratification of the treaty, sent to examine the reserved country, and if found satisfactory should be considered as their home, but if not, the President was authorized to set apart a suitable reservation for them not exceeding in extent 300,000 acres, "and then and in that case *all of the country belonging to said Indians north of said due west line is hereby*

ceded to the United States by the said Indians, they to receive the same rate per acre for it, less the number of acres assigned in lieu of it for a home, as now paid for the land south of said line."

The lower court begins its discussion of the treaty with the statement that "It does not appear, nor is it contended by the defendant, that they have ever paid anything to the Omaha Indians by virtue of the treaty." This statement is erroneous, as the Omahas received the consideration of \$881,000 for the lands south of the due west line from the mouth of Aoway Creek. No doubt the statement was intended to apply to the lands north of said line, which would be correct.

The substance of the discussion of the treaty of 1854 was that the Government knew, or should have known, that the Omahas owned all of the lands north of said due west line to the Missouri River before making said treaty, and "this the treaty makers on behalf of the Government recognized when this treaty was made, and the defendants can not now be heard to say that the Indians did not own the land when the treaty was made and had no right to make a cession of it." (Rec. 19, 20.) The statement in the third finding of fact of the court, in arriving at the acreage on which to base its judgment that "The area of the land north of the due west line mentioned in Article I of the aforesaid treaty is 783,365 acres which *belonged* to said Omaha Indians," (Rec. 16) was not based upon evidence as to the Indian title

to said lands, but was merely a deduction from the court's construction of the treaty.

The reasoning of the court in its opinion, we think, is based on too narrow a view of the provisions of the treaty of 1854.

It must be borne in mind that the area for which the judgment of the court was rendered extended from the due west line from the mouth of Aoway Creek to the Missouri River on the north and contained 783,365 acres.

If the Omaha Indians owned at the time of the treaty of 1854 all of the country bounded on the south by the Aoway Creek due west line and the Missouri River on the east and north, why was the distinction made between the country north and south of said line? Why was the line drawn due west from Aoway Creek and the area of their proposed reservation north of said line fixed at 300,000 acres? Why were they to be paid for lands *belonging* to them north of said line in excess of 300,000 acres instead of to the Missouri River, if that was their northern boundary? If this country north of said line was the old home and hunting ground of the Omahas, why was it necessary for a delegation accompanied by their agent to explore it in order to discover whether it was suitable for a reservation?

These questions, we believe, are answered by certain facts to which we shall refer:

Mr. Manypenny, Commissioner of Indian Affairs, who signed the treaty of 1854 on behalf of the United

States, in his annual report for the year 1854 to the Secretary of the Interior on the Omaha and other treaties (p. 5), places the northern boundary of the Omahas at the date of the treaty at 32 degrees, 40 minutes north latitude, and when the total area of the reservations of the different tribes, stated in his report as 15,000,000 of acres, is divided among them according to the different treaties, the reservation of the Omahas amounts to about 300,000 acres. The area of the reservation to be set apart as a home for the Omahas was estimated at 300,000 acres, because it was approximately the area between the due west line from the mouth of Aoway Creek and 42 degrees and 40 minutes. The actual amount of this area computed by the Land Office for use in this case was found to be 327,680 acres. Therefore if the construction of the lower court is to be followed—that the Government can not go back of the treaty to ascertain the Indian title to these lands, according to the treaty itself—the Omahas were only entitled to be paid for the excess of 27,680 acres instead of 483,365 acres, as held by the Court of Claims, to be paid at the same rate as the lands south of said due west line. (Rec. 16, 17.) It may be said in passing that the interest of the Omahas in such lands can not well be considered as in the nature of a quit-claim, as the price paid for the lands south of said line, which unquestionably belonged to them, was at the same rate.

Capt. Eastman of the Army in 1854 compiled a map showing the Omaha Reservation as extending from

the due west line from the mouth of Aoway Creek to the Missouri River on the north. This map has an indorsement thereon by Mr. Manypenny, dated August 5, 1854, to the effect that he had examined the said map in regard to the Indian reservations and found the same correct. This map, the Land Office states, is grossly incorrect, placing the Niobrara or L'eau Qui Court River nine miles too far south, the due west line from the mouth of Aoway Creek two and a half miles too far north, the bend of the Missouri River three and a half miles too far south, and the Mauvaisés River, fixed as the western boundary of the Omaha Reservation, eighteen and three-fourths miles too far east. This map was afterwards corrected by officials of the Interior Department so as to show the Ponca residence in the disputed territory southeast of the Niobrara River, and the Ponca claim as extending south of the due west line to the mouth of the Aoway Creek.

Mr. Manypenny, in his report to the Secretary of the Interior Department for 1856, stated that the Poncas inhabited and cultivated lands in the disputed territory, and Superintendent Cumming of the St. Louis Superintendency for the same year reported that "they inhabited the valley of the L'eau Qui Court and the adjacent country *below* that river," which would bring them well into the lands in controversy.

If it should be held that the treaty of 1854 concedes the title to the country up to 32 degrees 40

minutes to the Omahas, the Government is not estopped by that limitation from going into the Indian title to all of the country from the due west line from the mouth of Aoway Creek to the Missouri River on the north, as the Omahas could only legally cede to the United States territory which actually belonged to them.

Historical and official records and maps show conclusively that the Ponca Indians owned the country north of said due west line from the mouth of Aoway Creek. For instance, the Lewis and Clark report and map; the map of Father DeSmet, the Jesuit Missionary, made in 1851 for the purpose of determining the limits of the Laramie treaty of 1851, and afterwards used in all treaties with the Sioux Indians since that time, one of the most valued maps in the Congressional Library; the map of the American Fur Trading Company from 1807 to 1843, and practically all of the old maps and writings prior to the date of the treaty of 1854.

The appellees, as a matter of fact, are forced to rely almost exclusively on the language of the treaty of 1854 and the discredited Eastman map and the depositions of living Omaha Indians taken under the rules of the court in this case. The appellant has, however, also taken the depositions of living Ponca Indians, but relies mainly on the old records and maps to show the location of the Ponca and Omaha Indians up to the date of the treaty of 1854.

The Interior Department in reporting on this case said: "The papers examined do not show that the Omahas ever possessed or claimed the lands north of the line running westward from the mouth of Aoway Creek, except by the treaty of 1854."

There was a map filed in this case made by the Land Office from the records in the Interior Department which shows that the lands of the Ponca Indians ran even farther south of the due west line from the mouth of Aoway Creek.

Mr. Charles E. Mix, Commissioner of Indian Affairs, reported to the Secretary of the Interior on January 11, 1858, that in his opinion the Ponca Indians were the owners of part of the land ceded by the Omahas by the treaty of 1854, and it appears from his report that he was influenced in this opinion partly by the fact that the treaty between the Poncas and the United States of 1825 was made in the country in dispute, north of said due west line, and a diagram, also referred to in his report, which shows the proposed cession of the Poncas and is a reproduction of the map of Father DeSmit, heretofore described.

The treaty of March 12, 1858 (between the United States and the Ponca Indians), was signed by Commissioner Mix on the part of the United States, who in his letter submitting the treaty to the Secretary of the Interior said: "The Poncas inhabit the region or country on the west side of the Missouri River, commencing about fifty miles north of the Platte,"

which would place them in possession of all the country from the due west line from the mouth of Aoway Creek to the Missouri River on the north. This land was included in the lands ceded by the Poncas, as shown by the said diagram.

The report of the Committee on Indian Affairs of the Senate on the bill to refer the claim to the Court of Claims shows that the committee had before it and considered the treaty of 1854, and that it either had, or could have had, the Eastman map, as originally made, showing the complete claim of the appellees to the land north of the due west line from the mouth of Aoway Creek. The committee also had the claim of the appellees for compensation for 800,000 acres north of said due west line less 300,000 acres for a reservation, or 500,000 acres at 14 cents per acre. The appellees afterwards used the identical figures in their petition filed in the Court of Claims. The committee stated in its report that the Government did not contend that the Omaha Indians had ever received payment for the excess, but contended that it had been covered by some general settlement or course of dealing between the Government and said Indians.

In this connection it is proper to state that the only settlement of this question by the Government was the payment for these lands to the Ponca Indians.

If Congress had recognized the absolute justice of this claim, it could have been settled without the useless formality of a reference to the Court of Claims,

as the committee had all of the data for the necessary computation as to the amount of land and the price to be paid per acre.

The Secretary of the Interior in transmitting the report of the Senate Committee on Indian Affairs on the bill conferring jurisdiction on the Court of Claims said: "In the first place there seems to be some doubt as to whether the Omahas really owned the land north of the due west line to which reference has been made," and the jurisdictional act itself, among other defenses, provides that the Government may set up a counterclaim, and the only counterclaim that could possibly be set up in this case is the counterclaim for the reservation of 300,000 acres for which no consideration was given to the Government if all of the lands above the due west line from the mouth of Aoway Creek belonged to the Ponca Indians.

This court has said that a jurisdictional act makes no admission of liability nor any ground of liability but merely provides a forum for the adjudication of a claim. (*United States v. Mille Lac Indians*, 129 U. S. 498, 500.)

It is therefore clear that Congress intended by the jurisdictional act that the Court of Claims should determine the question of ownership of the lands north of said due west line and make an ultimate finding of fact as to such ownership. The result of the refusal of the lower court to go into the question of ownership renders it impossible for the appellant

to present the question of law as to whether the Government having purchased the same lands afterwards from the real owners, the Ponca Indians, is also liable to the Omahas.

The appellant submits that either party to a suit has a right to have any fact on which he relies to base a proposition of law, found by the Court of Claims, if such fact is material and is sustained by the evidence. (*United States v. Adams*, 9 Wall., 661; *United States v. Driscoll*, 131 U. S. Appendix CLIX; *Ripley v. United States*, 220 U. S. 491; *Id* 222 U. S. 144.) The appellant does not believe that the lower court was justified in cutting the ground from under it so that an argument of law could not be presented to this court, which may possibly take a different view of these facts.

It is respectfully submitted that for the reasons heretofore stated, the Court of Claims should be required to make the additional findings requested.

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FRANK DAVIS, JR.,

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